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result in harm. The Commission also concludes, however, that the plain language of the statute requires complaints filed pursuant to the general prohibitions of Section 628(b) regarding unspecified unfair practices must demonstrate that an alleged violation had the purpose or effect of hindering significantly or preventing the complainant from providing programming to subscribers or consumers.

In addition, the First Report and Order adopts a streamlined complaint process. The Commission's rules will encourage programmers to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a programmer declines to provide such information, it will be sufficient for a distributor to submit a sworn complaint alleging, based upon information and belief, that an impermissible price differential exists. With respect to complaints alleging price discrimination, the burden will be placed on the programmer to refute the charge by presenting evidence of the actual price differential and its

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Congress of the United States

Washington, DC 20515

March 23, 1993

The Honorable James H. Quello
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-265

Dear Chairman Quello:

We are writing to express our views concerning the Notice of Proposed Rulemaking regarding the program access provision (section 19) of the Cable Television Consumer Protection and Competition Act of 1992. We would like to thank you and the Commission staff for your cooperation in arranging meetings between members of our staffs and the Commission's staff to discuss in detail the Commission's implementation of that provision. This letter is intended to highlight certain concerns that were raised in those meetings.

In crafting the Cable Act, Congress recognized the unfair advantages that vertically integrated program suppliers have because of their ability to favor their affiliated cable operators over nonaffiliated cable operators and other multichannel video programming distributors, such as wireless cable and DBS. The purpose of section 19 was to prohibit this type of favoritism by making it unlawful for program vendors in which a cable operator has an attributable interest to refuse to sell programming to cable competitors or to discriminate with respect to prices, terms or conditions in making such sales. The continuation of these discriminatory practices is antithetical to Congress' goal of fostering the growth of emerging video distribution technologies.

Section 19 was the most intensely examined and vigorously debated provision of the Cable Act. The statutory language of the provision is clear, and in implementing section 19 the Commission should use a strict interpretation of that language.

The statutory language of section 19 provides that price differences are per se discriminatory unless a cable programmer can show that such price differences meet one of the four

additional showing of harm. After a cable competitor establishes a prima facie case, the burden of proof shifts to the vertically integrated programmer or cable operator who is alleged to be in violation.

The language of section 19 does not permit any other method of analysis of price discrimination. Nor does it permit any other method of allocating the burden of proof. Congress recognized that cable competitors do not have access to other than the most basic information about what they are being asked to pay as compared to what affiliated cable operators are paying for identical programming. Thus, the burden of proving that the apparent price disparity is somehow permissible under the terms of the statute must rest with the vertically integrated programmer, the party with access to all of the necessary pricing information, such as documentation of actual differences in the cost of delivery or transmission of the programming in question.

With regard to exclusive contracts, the provisions of section 19 are likewise clear. In areas not served by a cable operator as of October 5, 1992, exclusive contracts or similar arrangements which would prevent a cable competitor from distributing programming are expressly prohibited without exception. In areas served by a cable operator as of October 5, 1992, exclusive contracts are prohibited unless the Commission determines that a particular contract is in the public interest pursuant to the factors enumerated in subsection (c)(4). Public interest determinations should be made on a case-by-case basis in a declaratory proceeding prior to the parties entering into such an exclusive contract. The burden of proving that such a contract is in the public interest should be on the parties seeking to enter into an exclusive arrangement.

The only exclusive contracts which are grandfathered by the terms of section 19 are those entered into on or before June 1, 1990 and that are for delivery of programming to areas served by a cable operator as of October 5, 1992. The grandfathering of such a contract may not be expanded by the renewal or extension of the contract. Thus, all exclusive contracts entered into after June 1, 1990 are subject to the prohibitions of section 19.

As we stated at the outset, this letter is intended to be illustrative of our concerns, rather than a complete recitation of our positions with respect to the many issues raised in the NPRM. Our overall message is that the regulations implementing section 19 must be compatible with the straightforward mandate given to the Commission by Congress -- to increase competition and diversity in the multichannel video programming marketplace and to foster the development of new communications technologies.

We all want competition to thrive in the video programming marketplace. Issuing strong access to programming regulations will be the single most important action the Commission can take to foster that competition. We urge you to fulfill the goals of the statute when promulgating the section 19 regulations.

Sincerely,

W.J. (Billy) Tauzin

Rick Boucher

Jim Cooper

Ralph M. Hall

Mike Synar

Jim Slattery

cc: The Honorable Andrew C. Barrett
The Honorable Ervin S. Duggan